

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of )  
)  
)

DAISY MANUFACTURING COMPANY, INC. )  
doing business as Daisy Outdoor Products )  
400 West Stribling Drive )  
Rogers, Arkansas 72756 )  
)

Respondent. )  
)  
)

CPSC Docket No. 02-2

2007 MAR 29 A 10:42

**RESPONDENT'S MOTION TO DISMISS THE COMPLAINT  
FOR PROCEDURAL IRREGULARITY, VIOLATION OF LAW,  
ACTION WITHOUT OBSERVATION OF PROCEDURES REQUIRED  
BY LAW AND A DENIAL OF DUE PROCESS UNDER THE FIFTH  
AMENDMENT TO THE UNITED STATES CONSTITUTION**

Respondent, Daisy Manufacturing Company, Inc., pursuant to 16 C.F.R. Part 1025.23, moves the presiding officer for an Order dismissing the Complaint on the grounds that it was issued as a result of procedural irregularity and in violation of the "Sunshine In The Government Act", 5 U.S.C. 552b, without observation of procedure required by law, constituting a denial of due process, contrary to constitutional right 5 U.S.C. 706(1)(B), 5 U.S.C. 706(2)(D) and the Fifth Amendment to the Constitution. The procedural irregularities arise from the bias and prejudgment of Ann Brown, then Chairman of the U.S. Consumer Product Safety Commission ("CPSC" or "Commission"), and the concomitant violation by the Commission of Section 6(b) of the Consumer Product Safety Act ("CPSA"). In support of this motion, Respondent states the following:

**A. PROCEDURAL IRREGULARITY - Prejudgment of Law and Facts  
by Chairman Ann Brown of the Consumer Product Safety Commission**

1. On or about August 8, 2001, Ann Brown, the Chairman of the Commission, announced her resignation effective November 1, 2001. A copy of her statement of resignation is annexed hereto as **Exhibit A**. The other two Commissioners at the CPSC were Thomas Moore and Mary Sheila Gall. Included in the Chairman's statement were five (5) items of unfinished business before the Commission that she wished the Commission to address before she leaves. One of these items is stated as follows:

"A major recall of (or lawsuit regarding) a very dangerous product that kills and maims children."

Although she did not describe the product to which she referred, according to Commissioner Gall's Statement in Opposition to the Issuance of an Administrative Complaint, it was an open secret within the agency that Chairman Brown was referring to the Model 880 and 856 Powerline air guns manufactured by Respondent (See Statement, p. 2, ¶2).

2. On or about October 10, 2001, Respondent's counsel wrote to the Chairman asking her to recuse herself from further participation in this proceeding because her statement with reference to Daisy's Powerline air guns permitted a disinterested observer to conclude that she had prejudged the issues of law and fact relating to these products, and further, that her statement evidenced clear and convincing evidence of an unalterably closed mind on the issues of law and fact relating to Daisy's Powerline air guns. A copy of the October 10, 2001 correspondence to the Chairman was sent to Commissioners Thomas Moore and Mary Sheila Gall (see **Exhibit B**).

3. On or about October 19, 2001, Michael Solender, General Counsel to the CPSC, advised counsel for Respondent in a telephone conversation that the Chairman of the Commission, Ann Brown, would not recuse herself and would not affirm or deny the accusation that she prejudged the law and facts of the case relating to Daisy's Powerline air guns. He further indicated that she would not even respond to the request for recusal, and would vote on the decision as to whether a complaint will issue when it comes before the Commission.

4. On or about October 19, 2001, counsel for Respondent wrote to Commissioner Moore requesting that he fix a date sometime after November 1, 2001, the retirement date of the Chairman, so that consideration of the issues in this proceeding would take place after the Chairman had retired. Commissioner Moore was again advised that Respondent had a right to a fair and open proceeding before an impartial tribunal and the matter should be adjourned because the Chairman had prejudged the issues of fact and law as evidenced in her resignation statement that this product should be subject to "a major recall . . . (or a lawsuit . . . )" of " . . . a very dangerous product that kills and maims children". A copy of such correspondence to Commissioner Moore, which was also sent to Commissioner Gall, is annexed hereto as **Exhibit C.**

5. The Commission had taken action with respect to all of the items that Chairman Brown stated she wished to address in her resignation statement dated August 8, 2001, with the exception of the commencement of an administrative proceeding seeking a recall of the Powerline air guns manufactured by Daisy. The Commission meeting, which authorized the issuance of this Complaint, was held on October 30, 2001. It was the item 2 on the Commission's calendar described as "Enforcement Matter OS#4312". A copy of the CPSC Calendar for that date is

annexed as **Exhibit D**. Chairman Brown and Commissioner Moore voted to issue the Complaint, Commissioner Gall voted not to issue the Complaint and issued a Statement in Opposition to the Issuance of an Administrative Complaint Against Daisy Manufacturing Company.

**B. VIOLATION OF SECTION 6(b)(5) OF THE CONSUMER  
PRODUCT SAFETY ACT (15 U.S.C. 2055(b)(5))**

6. On or about October 29, 2001, the staff of the Commission, acting under the direction of then-Chairman Ann Brown, in violation of Section 6(b) of the CPSA, notified the press that on October 30<sup>th</sup> the Commission would issue the Complaint in this proceeding against the Respondent and scheduled a press conference for 2:00 P.M. on the afternoon of October 30<sup>th</sup>. Annexed hereto as **Exhibit E** are copies of USA Today and NY Times articles evidencing the vote to be taken that day on the decision to issue a complaint against Respondent. Journalist Jayne O'Donnell of USA Today contacted Jeffrey M. Locker, a member of this firm, on the afternoon of October 29<sup>th</sup>, advising him that she knew a complaint would issue, and in fact quoted verbatim from the complaint to issue against Respondent. See Affidavit of Jeffrey M. Locker annexed hereto as **Exhibit F**. The Statement in Opposition to Issuance of Administrative Complaint of Commissioner Mary Sheila Gall dated October 30, 2001 states "Yesterday some Commission staff furnished the confidential draft Complaint to a reporter and other news organizations before the Commission voted on the issue." (Statement in Opposition, p. 1)

7. The investigation of Respondent was conducted pursuant to the provisions of Section 15(b) of the CPSA (15 U.S.C. 2064(b)). Section 6(b)(5) of the CPSA (15 U.S.C. 2055(b)(5)) prohibits the Commission from disclosing any information submitted pursuant to Section 15(b) (15 U.S.C. 2064(b)), unless the Commission has issued a complaint under Section

6(c) or (d) (15 U.S.C. 2055(c) or (d)), alleging that such product presents a substantial product hazard, or, in lieu of such a proceeding, the person who submitted the information agrees to its public disclosure or submits a remedial settlement agreement dealing with such product. At the time the Commission staff informed the press of the proceedings against Respondent Daisy and released the Complaint to Jayne O'Donnell of USA Today, no vote to issue a complaint had been taken, nor had Respondent consented to the release of any information relating to the investigation or the complaint. Such action constituted a violation of Section 6(b)(5) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(5)).

8. In the week prior to the vote, Ann Brown, then Commission Chairman, scheduled a dress-rehearsal "briefing" for a press conference to be held at 2:00 P.M. on the afternoon of October 30<sup>th</sup> after the vote "to Announce Complaint Against Daisy Powerline Airguns" to be taken at 10:00 o'clock in the morning of that day. Annexed hereto and marked as **Exhibit G** is the advance "Briefing" for the Chairman, prepared in the week prior to the October 30<sup>th</sup> press conference by Becky Bailey, Deputy Director of the Commission Office of Information and Public Affairs. Annexed hereto and marked as **Exhibit H** is the advance press release marked "Release #03-DRAFT" and dated October 26, 2001, four days before the actual vote was taken on whether or not a complaint would issue. These exhibits were received by counsel for the Respondent two months after the vote was taken.

9. The carefully scripted "Briefing" indicated that the mother of and the attorneys for an injured 16 year old boy (all residents of and with offices in the State of Pennsylvania) had been invited to the press conference prior to the vote being taken and that a one-on-one interview in the hearing room with "CNN's Julie Valese and possibly other journalists" had already been

arranged for. The attorneys who were invited, Shanin Spector and Andy Youman, had filed a complaint with the Commission which led to the commencement of this proceeding.

10. The Chairman of the Commission and her staff knew with absolute certainty days prior to the October 30<sup>th</sup> vote that the Commission would vote to issue the Complaint against Respondent.

**C. VIOLATION OF THE GOVERNMENT IN THE SUNSHINE ACT**

11. It is apparent to a casual observer that prior to the actual vote, the Chairman of the Commission knew that the CPSC would issue a complaint. Commissioner Moore voted to issue the Complaint together with the Chairman. Commissioners Moore and Brown constituted a quorum of the Commission. The Government In The Sunshine Act requires that “every portion of every meeting of an agency shall be open to public observation.” 5 U.S.C. 552b(b). According to the Act, “a meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business.” 5 U.S.C. 552b(a)(2).

12. In addition, the Act provides:

“In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency would make public

announcement of the time, place and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.” 5 U.S.C. 552b(e)(1).

13. The only notice provided by the Commission of its intention to vote to issue a complaint in this proceeding was the notice given for the meeting of October 30<sup>th</sup> and contained in the calendar set forth as **Exhibit D**. No notice was ever provided of a meeting between Commissioner Moore and Chairman Brown any time prior to October 30<sup>th</sup>, which predetermined the issuance of a complaint. This predetermination enabled the Chairman, prior to the vote, (1) to order the preparation of a “Briefing” before the vote (**Exhibit G**), (2) order the preparation of a draft press release dated October 26, 2001 announcing the recall (**Exhibit H**), (3) schedule a press conference for 2:00 P.M. announcing the recall before the Commission held its vote on this matter at 10:00 A.M. on the morning of October 30<sup>th</sup>, inviting the attorneys for an injured plaintiff and his mother from the State of Pennsylvania, and (4) reserve an interview room for Julie Valse of CNN and possibly other press organizations so that videos showing the injured plaintiff could be exhibited at the October 30<sup>th</sup> press conference.

14. The foregoing failure to provide notice of the meeting between Commissioner Moore and Chairman Brown which determined that the Commission would issue the Complaint in this proceeding prior to October 30, 2001 violated the provisions of 5 U.S.C. 552b, the Government in the Sunshine Act.

15. A time line of the events giving rise to this motion is set forth below:

8/8/01	----	Chairman announces resignation and calls for a recall (or a lawsuit ) regarding a very dangerous product that kills and maims children. Known by all at CPSC and Daisy's counsel to refer to Daisy's Powerline Airguns.
10/4/01	----	Commission staff briefs Commission on Daisy's Section 15(b) Report in closed session.
10/10/01	----	Daisy's counsel informs Chairman that she prejudged facts and law in her August 8, 2001 statement; requests Chairman of Commission to recuse herself, copying Commissioners Moore and Gall.
10/19/01	----	Michael Solender, General Counsel for Commission, advises Aaron Locker in telephone conversation that Chairman will not respond to recusal and will neither affirm nor deny prejudgment.
10/19/01	----	Counsel for Daisy writes to Commissioner Moore copying Commissioner Gall requesting that vote on the Daisy matter be put off to a date after November 1, 2001, the Chairman's retirement date.
10/4- 10/19/01	----	Chairman Brown learns what Commissioner Moore's vote will be.
10/19- 10/26/01	----	Becky Bailey, Deputy Director of CPSC Office of Information and Public Affairs directed by Chairman to arrange for press conference at 2:00 p.m. after the 10:00 a.m. vote on October 30, 2001. Invites mother of and attorneys for injured boy (residents of Pennsylvania) to attend the press conference on October 30, 2001 at 2:00 p.m. and to meet with Chairman in her office in the morning; prepares briefing paper with sample questions and answers for Chairman, sets aside briefing room for press including Julie Valse of CNN.
10/24/01	----	CPSC issues calendar for October 30, 2001, indicating closed session meeting on OS-4312, which is the Daisy matter.
10/26/01	----	Three drafts of press release announcing recall prepared - final draft 10/26/01
10/26- 10/29/01	----	Press contacted including CNN, Washington Post, New York Times, Associated Press, USA Today and invited to Press Conference to be held at 2:00 p.m. on October 30, 2001.
10/29/01	----	Complaint leaked to Jayne O'Donnell of USA Today.
10/30/01	----	Commission votes to issue a complaint in 10:00 A.M. closed session. At 2:00 P.M., following the script prepared by the Deputy Director of the CPSC Office of Information and Public Affairs, Chairman Ann Brown holds a press conference.

## **WHEREFORE, Respondent**

(1) moves the Presiding Officer to dismiss this Complaint because it has been issued in violation of Respondent's right of due process under the Fifth Amendment to the United States Constitution. More specifically, Respondent cites a violation of the Government In The Sunshine Act (5 U.S.C. 552b), a violation of the Administrative Procedure Act, 5 U.S.C. 706, actions taken



without observance of procedures required by law, a violation of the provisions of Section 6(b)(5) of the Consumer Product Safety Act (15 U.S.C. 2055(b)(5)), and a violation of Respondent's right of due process to have a fair administrative hearing attended not only during its adjudication, but at the very outset upon the issuance of a complaint, with every element of fairness and also the very appearance of complete fairness;

(2) seeks a hearing, to be granted in the discretion of the Presiding Officer, for any *factual issues raised by this Motion*; and

(3) requests that this proceeding be stayed pending the decision of the Presiding Officer on this motion.

Dated: March 26, 2002

Respectfully submitted,

**LOCKER GREENBERG & BRAININ, P.C.**

Attorneys for Respondent

420 Fifth Avenue, 26<sup>th</sup> Floor

New York, NY 10018

Tel.: (212) 391-5200

By: 

Aaron Locker, Esq.

**FRIDAY ELDREDGE & CLARK**

Attorneys for Respondent

2000 Regions Center

400 West Capitol

Little Rock, AR. 72201-3493

Tel.: (501) 376-2011

By: William M. Griffin, III, Esq.

**MARIANNE MCBETH, ESQ.**

Daisy Manufacturing Co.

400 West Stribling Avenue

Rogers, AR. 72756

Tel.: (501) 636-1200

## CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. I hereby certify that on March 26, 2002, I have served the attached document described as **RESPONDENT'S MOTION TO DISMISS THE COMPLAINT FOR PROCEDURAL IRREGULARITY, VIOLATION OF LAW, ACTION WITHOUT OBSERVATION OF PROCEDURES REQUIRED BY LAW AND A DENIAL OF DUE PROCESS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION** on all parties and participants of record in these proceedings as follows:

Jimmie L. Williams Jr.  
Complaint Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814-4408

William Moore, Esq.  
Complaint Counsel  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814-4408

Thomas Murr, Secretary  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

Honorable William Moran  
c/o Whiting Beale  
1200 Pennsylvania Avenue, N.W.  
Suite 1900L  
Washington, D.C. 20460-2001

Marianne McBeth, Esq.  
Daisy Manufacturing Company, Inc.  
400 W. Stribling Avenue  
Rogers, AR 72756

William M. Griffin, III, Esq.  
Friday Eldredge & Clark  
2000 Regions Center  
400 West Capitol  
Little Rock, AR. 72201-3493

by placing a true copy thereof enclosed in a sealed envelope. I am "readily familiar" with the firm's practice of collection and processing for mailing. Under the practice it would be deposited with U.S. Postal Service on that same day, with postage thereon fully prepared in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

  
Jean Vincent



**STATEMENT BY CHAIRMAN ANN BROWN**  
**ANNOUNCING DEPARTURE DATE**

August 8, 2001

The U.S. Consumer Product Safety Commission (CPSC) has received a great deal of attention in the last few weeks. I am very gratified by the recognition we have received for the work we do here and its importance to the American public.

There has been considerable speculation about my plans. I want to end that speculation. President Bush is entitled to appoint his own Chairman of the CPSC. I plan to give him that opportunity. I will resign as Chairman and as a Commissioner on November 1, 2001, unless another Chairman is nominated and confirmed by the Senate before then. Nobody would be more pleased than I would if President Bush uses this opportunity to appoint a new Chairman who shares his philosophy, and also believes in the mission of this agency and will build on our work to protect the American public. I am hopeful that this announcement will provide time for another nominee to go through the confirmation process.

We have unfinished business here at the Commission. There are a number of areas where we need to take action to save children's lives before I leave. These include:

- redesigning baby bath seats to prevent children from drowning;
- a major recall of (or lawsuit regarding) a very dangerous product that kills and maims children;
- a standard for mattresses to protect against deaths from fires;
- a standard for bed rails to prevent children from suffocating when their heads get entrapped between the rail and the bed; and
- child resistant packaging for baby oil and other similar products to prevent aspiration deaths and injuries to children.

I plan to devote the coming months to working on these very important matters and others. What we do at the CPSC is keep families and children safe. As you can see, I plan to continue to help doing that for the next few months. And when I leave the agency, I am going to continue working to keep families and children safe. I plan to found a non-profit foundation called SAFE – a Safer America for Everyone – that will engage business, consumers and others in this critical mission.

As long as I am Chairman, I will work with CPSC's staff to pursue our mission with all our collective energy. It is the noblest of missions. I feel privileged to have been able to work here for almost 8 years and look forward to what we will achieve in the coming months.



LOCKER GREENBERG & BRAININ, P.C.  
ATTORNEYS AT LAW

AARON LOCKER  
THEODORE M. GREENBERG  
FREDERICK B. LOCKER  
JEFFREY M. LOCKER

DAVID N. BRAININ  
OF COUNSEL

420 FIFTH AVENUE, NEW YORK, N.Y. 10018  
(212) 391-5200  
TELECOPIER (212) 391-2035

October 10, 2001

Via FAX - (301) 504-0768 & Mail

The Honorable Ann Brown, Chairman  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

Re: CPSC CA010003  
Daisy Manufacturing Company  
Powerline Airguns

Dear Ms. Brown:

We represent Daisy Manufacturing Company in the above proceeding.

In your resignation statement and press release dated August 8, 2001, you stated that there are a number of areas where the Commission needs to take action to save children's lives before you leave. These include:

“... a major recall (or lawsuit regarding) a very dangerous product that kills and maims children”

Although the product is not identified, it is an open secret at the agency that the products are the Powerline Airguns manufactured by Daisy and identified in the above proceeding.

Notwithstanding a two-year investigation of these products, including metallurgical tests, mechanical engineering tests and human factors evaluations in 1994 and 1995, all of which resulted in a Commission statement in February 1996 that these products were not defective, complied with applicable voluntary standards, were not toys and should be used only under adult supervision, and two further engineering evaluations in 1999 supporting the Commission conclusion, you have concluded that the product should be recalled or subject to a lawsuit to compel recall because they are a very dangerous product that kills and maims children.

October 10, 2001

Page Two

Clear and unequivocal indications from the staff establish that you are the driving force behind the charges against Daisy. We do not believe you can or will deny this. We are further advised that the Engineering and Human Factors staff of the agency has not produced any tests or data supporting the reopening of the investigation of Daisy's Powerline Airguns which would in any way contradict their findings in the two-year investigation of 1994-1995 and the subsequent 1999 engineering evaluations and that the Commission staff sought support for this renewed investigation from outside experts.

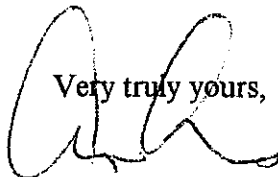
We believe that, under the foregoing circumstances, your statement that these products should be recalled (or a lawsuit instituted to compel their recall) because they "kill and maim children" requires your recusal from further participation in the adjudicatory proceeding. Specifically, we ask that you recuse yourself from voting on the issuance of a complaint which would commence such a proceeding. The standard for recusal of a commissioner of an administrative agency is set forth in Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583, 138 U.S. App. D.C. 152 (1970).

The Cinderella rule disqualified a decisionmaker if "a disinterested observer may conclude that he has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." 138 U.S. App. D.C. at 160, 425 F.2d at 591 (quoting Gilligan, Will & Co. v. SEC, 267 F.2d at 469).

We further believe that your statement evidences a clear and convincing showing that you have an unalterably closed mind on matters critical to the disposition of the proceeding, a more stringent standard which the Court of Appeals has applied to determine recusal in rulemaking proceedings. See Association of National Advertisers, Inc., et al. v. Federal Trade Commission, et al., 627 F.2d 1151, 201 U.S. App. D.C. 165 (1979).

Accordingly, we respectfully request that you recuse yourself from voting on the formal commencement of an adjudicatory proceeding in the above case and refrain from casting a vote for the issuance of a complaint in this matter.

Very truly yours,



Aaron Locker

AL:jv

Enc.

cc: The Honorable Mary Sheila Gall  
The Honorable Thomas Moore





LOCKER GREENBERG & BRAININ, P.C.  
ATTORNEYS AT LAW

AARON LOCKER  
THEODORE M. GREENBERG  
FREDERICK B. LOCKER  
JEFFREY M. LOCKER

DAVID N. BRAININ  
OF COUNSEL

420 FIFTH AVENUE, NEW YORK, N.Y. 10018  
(212) 391-5200  
TELECOPIER (212) 391-2035

October 19, 2001

Honorable Thomas Moore  
U.S. Consumer Product Safety Commission  
4330 East West Highway  
Bethesda, Maryland 20814

Re: CPSC CA010003  
Daisy Manufacturing Company - Powerline Airguns

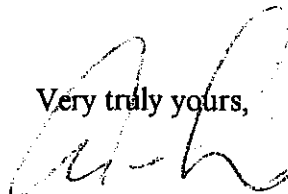
Dear Commissioner Moore:

Thank you for meeting with us and our clients on October 16, 2001.

I understand this matter has been moved from a ballot vote to an agenda item. In determining a date for the agenda item, I would like to restate that Daisy has a right to a fair and open proceeding that encompasses presentation to an impartial tribunal. The requirements of due process clearly recognize the right of the commissioners to formulate policy. However, the right to an impartial vote is jeopardized when the Chairman has already pre-judged the issues of fact and law as evidenced in her resignation statement that this product should be subject to "a major recall (or a lawsuit)" and is "a very dangerous product that kills and maims children."

In fixing a date for consideration of Daisy airguns as an agenda item, I respectfully request that you fix a date sometime after November 1, 2001, the retirement date of the present Chairman. Justice will not be served if a biased commissioner who has prejudged the issues is permitted to vote on a decision to issue a complaint which will have a broad economic impact on the entire airgun industry.

Very truly yours,



Aaron Locker

AL:jv

**Exhibit D**



# U.S. Consumer Product Safety Commission

## CPSC Public Calendar

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Vol. XXVIV No.	U.S. Consumer Product Safety Commission - Washington, DC	October 24,
4	20207	2001

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### Commission Agendas

Listed below is the agenda for the Commission meetings scheduled for the week of October 29, 2001. Circumstances sometimes require change to the agenda. For a recorded message concerning the latest agenda information call (301) 504-0709.

Commission Meeting  
Tuesday, Oct. 30, 2001  
10:00 a.m.

Room 420, East West Towers  
4330 East West Highway  
Bethesda, Maryland

Part Open to the Public; Part Closed

Open to the Public

#### 1. Bed Rails (Decision)

The Commission will consider options for Commission action to address hazards associated with portable bed rails.

Closed to the Public

#### 2. Enforcement Matter OS# 4312

The Commission will consider issues related to enforcement matter OS# 4312.

### Meetings Between Commission Staff and Outside Parties

All meetings listed below are open to the public unless otherwise stated. For information on a specific meeting or to attend a meeting, please call the contact person listed for that meeting.

Abbreviations: we use asterisks (\*) to identify meetings for the current week which have not appeared before in the printed Public Calendar. If the meeting involves discussion of a "substantial interest matter," defined by CPSC's Meetings Policy, we show the date when we posted notice of the meeting on

the Master Calendar. The Master Calendar is in the Office of the Secretary, Room 502, telephone (301) 504-0800. We indicate whether a meeting is of substantial interest by the symbol (S); we use the symbol (N) to indicate non-substantial interest meetings. The Commission offices are located in the East West Towers Building, 4330 East West Highway, Bethesda, Maryland.

Under the Meetings Policy, a staff person holding or attending a substantial interest meeting must file a log of the meeting with the Office of the Secretary within 20 days.

Week of October 29 thru November 4

Tuesday, October 30

Linda Smith, Epidemiology, meeting with the National Association of State Fire Marshals to discuss CPSC's procedures for estimating product-specific fire losses; 10:00 a.m., Phoenix Park Hotel, Washington, DC. The meeting was requested by the National Association of State Marshals. For additional information contact Linda Smith, (301) 504-0470, ext. 1275. (S)

### *Future*

Thursday, November 8 (Cancellation)

The meeting between Alan Schoem, Office of Compliance, and other CPSC staff and Kathleen McCarthy, Esq., Williams-Sonoma, and other industry and consumer representatives to discuss use of electronic data bases to enhance the effectiveness of recalls is canceled.

Thursday, November 8

William King, Engineering Sciences, meeting with the American Council on Electrical Safety (ACES) to discuss electrical safety issues in general; 9:30 a.m., Comfort Inn – BWI Airport, Baltimore, MD. The meeting was requested by Kathleen Woods, ACES. For additional information contact William King, (301) 504-0508, ext. 1296. (S)

Marc Schoem, Office of Compliance, participating in McGuire Woods Products Liability Management Seminar; St. Regis Hotel, Washington, DC. For additional information contact Marc Schoem, (301) 0608, ext. 1365. (N)

Saturday, November 10

William King, Engineering Sciences, meeting with the National Electrical Safety Foundation (NESF) to discuss electrical safety for consumers; 9:00 a.m., Monarch Hotel, 2401 M Street, N.W., Washington, DC. The meeting was requested by Michael Clendenin, NESF. For additional information contact William King, (301) 504-0508, ext. 1296. (S)

### **Addendum**

Meeting notices printed in this section did not reach the Office of the Secretary in time to meet the Tuesday noon deadline for the previously printed Public Calendar. Under the CPSC Meetings Policy, however, staff persons, including Commissioners, can meet the seven-day notice requirement by placing notice of the meeting on the Master Calendar at least seven days before the meeting. The Master Calendar is in the Office of the Secretary, Room 502, East West Towers Building.

In addition, the policy allows the Office of General Counsel to waive the seven-day notice requirements of meetings of the staff personnel, and individual Commissioners can waive the requirements for themselves and their personal staff.

No such meetings listed this week.

**Exhibit E**



## **CPSC may sue Daisy to recall BB guns ; Ammo can get lodged inside weapon, users may think that it's unloaded**

*USA Today*, Arlington, Va.; Oct 30, 2001; Jayne O'Donnell;

### **Abstract:**

*BBs can become lodged inside the guns, where they are difficult to see and can cause injuries when users don't realize the guns are loaded, the agency says. Safety officials also want the guns recalled because they don't have automatic safety locks. CPSC is focusing on 16 versions of Daisy's PowerLine model 856 and 880 BB guns. The guns are blamed for 28 deaths and 210 serious injuries since 1972.*

*Daisy lawyer Jeffrey Locker would not comment on CPSC's action but says users must go through seven steps to fire the guns, making it impossible for them not to know a BB is loaded. He noted CPSC has investigated "air guns for 20 years and on three separate occasions and determined they are not defective."*

### **Full Text:**

*Copyright USA Today Information Network Oct 30, 2001*

The Consumer Product Safety Commission is expected to vote today to sue Daisy Manufacturing, one of the top two makers of BB guns. The move is intended to force a recall of more than 4 million high-powered versions of the guns, people close to the commission say.

BBs can become lodged inside the guns, where they are difficult to see and can cause injuries when users don't realize the guns are loaded, the agency says. Safety officials also want the guns recalled because they don't have automatic safety locks. CPSC is focusing on 16 versions of Daisy's PowerLine model 856 and 880 BB guns. The guns are blamed for 28 deaths and 210 serious injuries since 1972.

CPSC would not comment before today's vote. Chairman Ann Brown, who is leaving the agency Wednesday, needs one other commissioner's vote to sue. Thomas Moore is expected to back her, though his office would not comment.

Daisy lawyer Jeffrey Locker would not comment on CPSC's action but says users must go through seven steps to fire the guns, making it impossible for them not to know a BB is loaded. He noted CPSC has investigated "air guns for 20 years and on three separate occasions and determined they are not defective."

But the family of BB gun victim John Tucker Mahoney has been pushing for a recall. Mahoney had turned 16 in May 1999 when his friend fired a Daisy gun both thought was empty at Mahoney's head. The gun was fired several times earlier without expelling BBs.

Mahoney, who has serious brain injuries, must now use a wheelchair. Daisy reportedly settled the family's lawsuit for \$18 million.

"In cases involving BBs . . . nine times out of 10, the shooter always says 'I didn't know it was loaded,' " Locker says. "I assume they were reckless."

Bill Kitzes, a former CPSC official and product-safety analyst who worked on the Mahoney case, says when the BB gets stuck between the inner and outer barrels of the guns, it can shake loose without users

realizing it's on the firing pin.

"Once they think its empty, they don't look at it every time they fire it," Kitzes says. Kitzes says Daisy rearranged the area where the BBs rest and eliminated the places where they could get stuck in 1999.

Philadelphia attorney Shanin Specter, who represents the Mahoney family, says "they fixed it, but didn't recall the bad guns."

The CPSC probe struck fear into the National Rifle Association, which worried the recall could lead to action against all guns. About 2% of guns have automatic safety locks. NRA members contacted CPSC and also asked for help from members of Congress.

"Daisy has sought to turn this into a Second Amendment issue," Specter says. "But it's just a straight-forward, good-old-fashioned product-defect issue with a product that doesn't do what the manufacturer wants it to do."

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*Sic:926150**Sic:926150**Sic:332995*

**Sub Title:** [FINAL Edition]

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Litigation

Defective products

**Companies:** **Consumer Product Safety Commission***Sic:926150*

**CPSC***Sic:926150*

**Daisy Manufacturing Inc***Sic:332995*

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## ***Safety Panel Voting Today On a Recall Of BB Guns***

By JULIAN E. BARNES

The Consumer Product Safety Commission will vote today on whether to seek a recall of seven million Daisy BB guns that some contend can fire pellets even when they appear to be empty and that have been blamed for 23 deaths and many injuries in 30 years.

The vote — which will come a day before Ann Brown, the chairman of the commission, is scheduled to step down — has become highly contentious. The Daisy Manufacturing Company has maintained that its air guns are not defective, and the National Rifle Association has urged its members to oppose any action.

At the center of the debate are two high-velocity air guns made by Daisy, the model 880 and the 856. The commission has been investigating whether guns made before 1999 are defective because BB's can lodge inside guns that appear empty.

The commission is also investigating whether all of the high-velocity Daisy guns, including ones on the market, are faulty because they do not have automatic safeties.

Andrew Youman, a lawyer who sued Daisy, said the company's high-velocity air guns had been responsible for 23 deaths from 1971 to 1998 and about 20 brain injuries. Daisy sells about 250,000 a year, Mr. Youman said.

Two of the three commissioners must vote to file a complaint with an administrative judge to force a recall.

Both supporters and opponents of Daisy said they believed that Ms. Brown would call for a broad recall of the guns, but they said they were unsure how the other commissioners would vote. Lawyers for Daisy asked Ms. Brown yesterday to abstain from voting. They accused her of leaking information about the recall.

Shanin Specter, a lawyer who worked with Mr. Youman to sue Daisy, said the Model 856 Daisy rifle was defective because it could give people the impression that a loaded gun was empty. Mr. Specter sued Daisy on behalf of John Tucker Mahoney of Doylestown, Pa. On May 22, 1999, Mr. Mahoney, then 16, and a friend, Ellsworth Weatherby IV, had cocked and fired their Daisy gun about eight times and thought it was empty because no BB's came out. Mr. Weatherby cocked the gun and aimed it at Mr. Mahoney, intending to blow his hair with a blast of air, Mr. Youman said. The gun discharged a BB into Mr. Mahoney's skull and severed an artery in his brain. Mr. Mahoney, now 18, can no longer walk, talk or eat, Mr. Specter said. He said Daisy knew about the problem and modified the design of the rifles in 1998 and 1999 to solve the problem. But the company did not report the problem or recall existing products, he said.

Daisy settled Mr. Mahoney's suit last March for \$18 million. Daisy officials said the government had investigated and exonerated Daisy's guns three times in the last two decades.

**Exhibit F**

UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

	-X		
	:	:	
In the Matter of	:	:	
	:	:	CPSC Docket No. : 02-2
Daisy Manufacturing Company, Inc.	:	:	
d/ba Daisy Outdoor Products	:	:	
400 West Stribling Drive	:	:	
Rogers, Arkansas 72756	:	:	
	:	:	
Respondent	:	:	
	:	:	
	-X		

STATE OF NEW YORK    )  
                                  SS.:  
COUNTY OF NEW YORK)


JEFFREY M. LOCKER, being duly sworn under oath states and affirms the following:

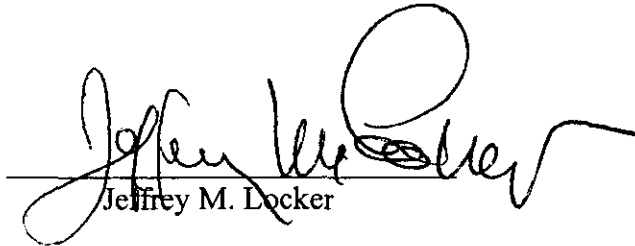
1.     I am a member of the law firm of LOCKER, GREENBERG & BRAININ, P.C.,  
420 Fifth Avenue, New York, New York 10018.
  
2.     On October 29, 2001, prior to the scheduled vote by the Commissioners of the  
U.S. Consumer Product Safety Commission (CPSC) on whether or not to issue a complaint  
against Daisy Manufacturing Company, Inc. (Daisy), I was contacted by Jayne O'Donnell, a  
reporter for USA Today, and asked to specifically comment on the "Daisy Complaint" to be  
issued by the Commission. As I was aware that the confidentiality provisions of Section 6 (b) of  
the Consumer Product Safety Act precluded me from discussing matters which were the subject  
of a Section 15(b) filing with the CPSC, I stated to Ms. O'Donnell that I was unaware of any  
complaint scheduled to be issued by the CPSC against Daisy. In response, Ms. O'Donnell stated  
in advance of the scheduled vote that the CPSC was going to vote to issue a complaint against  
Daisy and proceeded to read to me verbatim specific provisions of the CPSC complaint. In a

state of shock, I asked Ms. O'Donnell if she had a copy of the complaint. She stated that she did not have a copy of the complaint out but that the complaint had been read to her verbatim over the telephone. I then asked Ms. O'Donnell who had read her the complaint over the telephone. She said she could not divulge her sources. I stated it would be irresponsible to publish such information prior to a vote by the CPSC, she stated that she enjoyed a beneficial relationship with the CPSC, that she had worked closely with Commissioner Ann Brown's office to bring important safety issues to the attention of the American public and that she was being responsible.

3. It was clear to me that the complaint had been leaked to the press by someone at or associated with the Commission prior to the October 30, 2001 vote by the Commission on the matter.

Sworn to before me this  
26<sup>th</sup> day of March, 2002.

  
AARON LOCKER  
Notary Public, State of New York  
No. 02LO5023360  
Qualified in Nassau County  
Commission Expires February 7, 2006

  
Jeffrey M. Locker

**Exhibit G**

**Briefing for October 30<sup>th</sup> News Conference**

**To:** Chairman Ann Brown

**From:** Becky Bailey

**What:** News Conference to Announce Complaint Against Daisy Powerline Airguns

**Where:** CPSC Hearing Room

**When:** Tuesday, October 30, 2 p.m.

**Note:** 1:30p.m.: Expect Becky Mahoney and attorneys Shanin Specter and Andy Youman to arrive early at your office.

**Note:** Afterwards: Brief one-on-one interview in hearing room with CNN's Julie Valse and possibly other journalists

**Agenda:** AB speaks &

- Then introduces Becky Mahoney, mother of Tucker

Becky Mahoney speaks

- AB introduces video of Tucker
- Reporters will see two clips from home video of Tucker before and after the shooting

AB introduces Jimmie Williams who stands and demonstrates the defect

AB asks if there are any questions

**Q and A**  
**Daisy**

**(1) *How many times has the CPSC looked at Daisy's high-powered BB guns in the past and concluded that there was no problem?***

**(A) The Commission has been concerned about potentially dangerous defects in these high-powered BB guns for a number of years. From 1981 through 1999, CPSC's Office of Compliance initiated six investigations of the Powerline Airguns, and the Commission received five petitions relating to BB guns. At that time it was felt that the staff did not have sufficient information to take action.**

**I DO know that today we have a great deal of new information and the Commission authorized the filing of this complaint.**

**(2) *Why did you reach a different conclusion in this investigation, than the Commission staff did in the past?***

**(A) CPSC's staff has now conducted its most thorough investigation into these BB guns and obtained new information from Daisy and outside parties. They also retained outside experts in metallurgy and firearms engineering. The staff has now been able to replicate the defect and observe the manner in which the BBs are lodging in the guns. Based on the information obtained through this new investigation, the staff contends that the evidence supports pursuing a recall by issuing an administrative complaint.**

**(3) *What is the new information you received?***

**Because this involves pending legal action, I cannot go into specifics on that. However, the staff**

- has examined more than 50,000 documents,**
- had two qualified experts look at these BB guns, and**
- replicated the defects.**
- We now know how these defects occur, and there is incident information that supports the staff's findings.**

**(4) *You have told Daisy a number of times that there was no problem with its guns. Is it fair to now demand they recall millions of guns?***

**(A) Our mission is to protect consumers and children from potentially defective, deadly products. Daisy has sold 7.5 million of these high powered airguns and spent millions on settling lawsuits with the families of kids who have been-killed or maimed...when it would cost only \$2 per gun to fix the problems.**

**(5) *How did you initiate this investigation?***

**Our staff continuously receives complaints from consumers about products they believe are defective. Staff evaluates each complaint and decides whether further investigation is warranted. In this case, the Commission received a report that Daisy had made changes to the model 856 Powerline Airgun in order to correct potential design defects. However, the staff has concluded there are still defects.**

**(6) *The perception out there is that you want to ban all BB guns. Aren't you firing the opening salvo?***

**(A) This case has never been about banning all BB guns, nor all of Daisy's BB guns. This case is also not about whether BB guns should or should not have a high velocity. This case is about defective products that the complaint charges can kill and maim children. It concerns two models of Daisy Powerline Airguns.**

**(7) *Are you investigating other airguns?***

**(A) CPSC is looking at other manufacturers' airguns to see if they have potential defects.**

**(8) *Don't parents have a responsibility to supervise their children and to teach children not to point guns at each other?***

**(A) Of course, parents have a responsibility to supervise their children and to make sure they understand how to properly use a BB gun that a child has obtained. However, pointing a BB gun at another child is a foreseeable use. As I said earlier, children point guns at each other... whether it's a 5-year-old aiming his water**



pistol at his sister or a 16 year old playing with his first BB gun. Some children will listen to the admonition not to point a BB gun at people. Some of them won't listen. This case is about preventing a child from injuring another person with a BB gun that the complaint charges is defective.

- (9) *Aren't you attacking an American tradition here...kids and BB guns?*

This is not the popular conception of a BB gun, in which a BB might simply sting your skin, if you are shot. This is not Daisy's Red Rider BB gun, that many of you played with as children. These guns can fire a BB as fast as a bullet fired from a handgun. Therefore, if a high powered BB gun is defective, the result can be grievous injury and death.

- (10) *Haven't you been after Daisy for months? Why are you picking on this company...aren't other high powered BB guns just as dangerous?*

- (A) The Commission focuses on defective hazardous products. The complaint contends that two models of Daisy Powerline Airguns are defective and should be recalled. CPSC has never said that because a BB gun is high powered, it is defective or should be recalled.

- (11) *Are these guns still on store shelves?*

- (A) Yes, right now a child can walk in and purchase these two Daisy BB guns, models 880 and 856, with which, the complaint charges, they can shoot a friend because they didn't realize that a BB is lodged in the gun's magazine. Daisy says it now markets these guns to children over 16 years old, but there is no federal law that prevents younger children from purchasing them or playing with them.

- (12) *Why are you, Ann Brown, announcing this legal action and not your staff?*



# News from CPSC

## U.S. Consumer Product Safety Commission

Office of Information and Public Affairs

Washington, D.C. 20207

For Immediate Release

October XX, 2001

Release # 03-DRAFT

10/26/01 4:46 p.m.

CPSC Contact:

(301) 504-0580

### **CPSC Files Lawsuit Against Daisy Manufacturing Co. To Recall Two Models of Daisy's Powerline Airguns Due to Defects**

WASHINGTON, D.C.— The U.S. Consumer Product Safety Commission (CPSC) today filed a lawsuit against the Daisy Manufacturing Co. (Daisy), doing business as Daisy Outdoor Products, of Rogers, Ark., seeking a recall of 7.5 million Powerline Airguns. The lawsuit seeks to compel Daisy to notify consumers that the model 880 and model 856 Powerline Airguns are defective, and present a substantial risk of death or injury to anyone using the airgun. Daisy has refused to voluntarily recall these BB guns, which have been sold since September 1972 in sporting goods, department, and hardware stores, as well as on the Internet.

CPSC's staff has learned of at least 15 deaths and 171 serious injuries that have been attributed to alleged design and manufacturing defects in Daisy's Powerline Airguns. About eighty percent of those who have been killed or injured by the airguns were children under the age of 16. Children have been killed after being shot in the head or chest. Other children have been seriously injured after BBs punctured the heart, spinal cord, or skull, causing paralysis and brain damage.

CPSC began an investigation in May 2000 following reports that Daisy had made changes to the model 856 Powerline Airgun in order to correct potential design defects. The lawsuit filed by CPSC staff alleges that Daisy's Powerline Airguns are still defective because BBs can become lodged in the magazine of the airguns, even though the airgun can appear empty. It is foreseeable that a child, believing the BB gun is empty, could play with Daisy's Powerline Airgun in an unsafe manner. The stuck BB can then become dislodged, causing death or serious injury if fired in the direction of another person. CPSC staff believes that all 856 and 880 model airguns sold by Daisy have this defect.

The CPSC lawsuit also contends that Daisy's Powerline Airguns' failure to incorporate an automatic safety system makes the BB guns defective. Daisy's Powerline Airguns currently have a manual safety button on them.

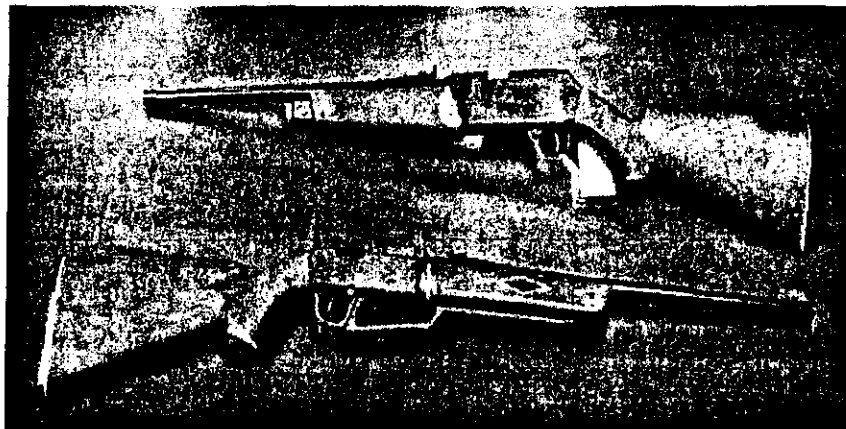
-more-

One of the many tragic incidents that CPSC learned about involved John "Tucker" Mahoney, of New Hope, Pa. On May 24, 1999, Tucker and his friend were shooting a model 856 Powerline, two days after he had received the airgun as a gift for his 16<sup>th</sup> birthday. CPSC staff contends that as a result of a defect within the airgun, a BB remained lodged inside of the airgun's magazine, unbeknownst to Tucker or his friend. Believing the airgun was unloaded, Tucker's friend pointed and fired the airgun at close range. The hidden BB became dislodged, chambered, and struck Tucker in the head. Tucker was severely injured and is now in a near vegetative state. In February 2001, Daisy settled Tucker's product liability lawsuit for approximately \$18 million dollars.

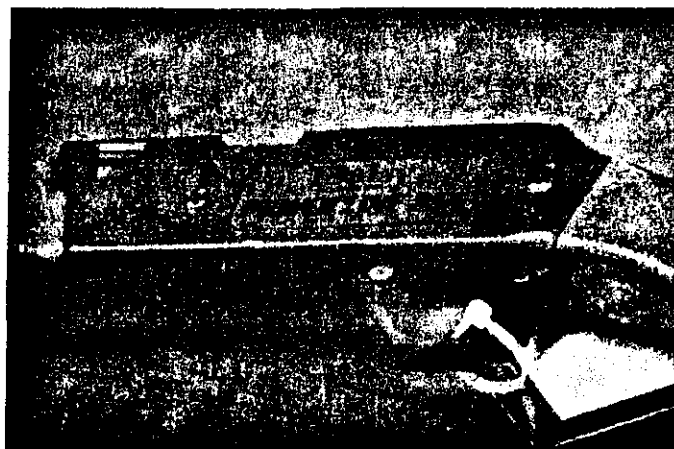
CPSC believes that it would cost \$2 per airgun to correct the defect that causes BBs to become lodged in the loading mechanism and to put an automatic safety device on the airgun.

CPSC staff filed the lawsuit against Daisy under Section 15 of the Consumer Product Safety Act and Section 15 of the Federal Hazardous Substances Act. The administrative complaint does not seek a ban on all airguns or all Daisy airguns. The complaint seeks a recall of these two models of airguns which staff believes are defective.

CPSC's case will be heard by an administrative law judge.



**DAISY 856 MODEL (TOP) AND 880 MODEL (BOTTOM) POWERLINE AIRGUNS**



**CLOSE-UP OF DAISY'S 856 MODEL**



**FIRING CHAMBER ON DAISY'S 856 MODEL**

To see a picture of the recalled product(s) and/or to establish a link from your web site to this press release on CPSC's web site, link to the following address: <http://www.cpsc.gov/cpscpub/prerel/prhtml02/02XXX.html>. The U.S. Consumer Product Safety Commission protects the public from unreasonable risks of injury or death from 15,000 types of consumer products under the agency's jurisdiction. To report a dangerous product or a product-related injury, call CPSC's hotline at (800) 638-2772 or CPSC's teletypewriter at (800) 638-8270, or visit CPSC's web site at <http://www.cpsc.gov/talk.html>. For information on CPSC's fax-on-demand service, call the above numbers or visit the web site at <http://cpsc.gov/about/who.html>. To order a press release through fax-on-demand, call (301) 504-0051 from the handset of your fax machine and enter the release number. Consumers can obtain this release and recall information at CPSC's web site at <http://www.cpsc.gov>.

####

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UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of )  
)  
)

DAISY MANUFACTURING COMPANY, INC. )  
doing business as Daisy Outdoor Products )  
400 West Stribling Drive )  
Rogers, Arkansas 72756 )  
)

Respondent. )  
)  
)

CPSC Docket No.: 02-2

7/17/02 2:14 PM

7/17/02 2:14 PM

**MEMORANDUM OF LAW IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS THE COMPLAINT**

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UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION

In the matter of )  
)  
)

DAISY MANUFACTURING COMPANY, INC. )  
doing business as Daisy Outdoor Products )  
400 West Stribling Drive )  
Rogers, Arkansas 72756 )  
)

Respondent. )  
)

CPSC Docket No.: 02-2

**MEMORANDUM OF LAW IN SUPPORT OF  
RESPONDENT'S MOTION TO DISMISS THE COMPLAINT**

**PRELIMINARY STATEMENT**

This case deals with a campaign by the Chairman of the U.S. Consumer Product Safety Commission (hereinafter "Commission" or "CPSC") to force Respondent Daisy Manufacturing Company to recall certain rifles that the CPSC had told Respondent for 20 years were not defective. The facts, as outlined in the Motion, make it clear that Chairman Brown reached a decision to recall before considering the evidence and obviously met and conferred with another commissioner so that she knew in advance of the actual vote how another commissioner would vote.

Whatever loftiness of motive, if any, may be attributed to former Chairman Ann Brown, it is appalling to witness the insensitivity to the requirements of due process exhibited by former Chairman Ann Brown in this case. The conduct of the Chairman, indeed, the Commission majority, in issuing this Complaint, amounted to a denial of due process. The decision to issue the Complaint was accompanied by outright prejudgment on the part of the Chairman, an apparent

meeting in violation of the provisions of the Government In The Sunshine Act by Commissioner Moore and the Chairman, without observation of the procedures required by law. According to Commissioner Gall, it was accompanied by a violation by the Commission staff of Section 6(b)(5) of the Consumer Product Safety Act ("CPSA") (15 U.S.C. §2055(b)(5)). As a practitioner before the CPSC since its inception, this counsel, like Commissioner Gall, has never seen such clear abuses of the Fairness Doctrine, Government In The Sunshine Act and due process requirements.

The totality of these violations and this prejudgment constitutes denial of due process which requires dismissal of this Complaint.

#### **I. REQUIREMENTS OF FAIRNESS**

An administrative hearing must be attended not only with every element of fairness during the adjudicative phase, but also at the outset upon the issuance of the complaint, and with the very appearance of complete fairness. Amos Treat & Co. v. SEC, 113 U.S.App.D.C. 100, 107, 306 F.2d 260, 267 (1962). As the Supreme Court stated in another context:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136-137, 75 S.Ct. 623, 99 L.Ed. 942 (1955)

The Administrative Procedure Act provides an agenda for fairness in the conduct of administrative proceedings which informs the Presiding Officer in this case. 5 U.S.C. §706, which prescribes the scope of review of agency action by a reviewing court, reads as follows:

#### **§706 Scope of Review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and

statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall

- (1) compel agency action unlawfully withhold or unreasonably delayed; and
- (2) hold lawful and set aside agency action, findings, and conclusions found to be
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the role of prejudicial error.

#### **A. SCOPE OF REVIEW**

5 U.S.C. §706 addresses a review of final agency action, while 5 U.S.C. §704 provides that “a preliminary procedural or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.” Counsel for Respondent is also aware of the fact that agency regulations under the Consumer Product Safety Act and the Federal Hazardous Substances Act are not reviewable under the provisions of 5 U.S.C. §706, but are reviewable under 15 U.S.C. 2060. Forester v. Consumer Product Safety Commission of U.S.

C.A.D.C.1977, 559 F.2d 774, 182 U.S.App.D.C. 153. Respondent is not requesting a review of agency regulations, but agency conduct, which is subject to the provisions of 5 U.S.C. §706.

## **II. VIOLATIONS OF THE GOVERNMENT IN THE SUNSHINE ACT**

The Government in the Sunshine Act requires that "every portion of every meeting of an agency shall be open to public observation." 5 U.S.C. §552b(b). According to the Act, "a meeting means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations concern the joint conduct or disposition of official agency business." 5 U.S.C. §552b(a)(2). The Report of the Senate Committee on Government Operations explains, "the reference to the number of individual agency members required to take action means a quorum." S. Rep. No. 94-354, p. 19 (1975). According to the rules governing the CPSC, a quorum of the CPSC at the time of these meetings was two members, because "if there are only three members serving on the Commission because of vacancies, two members constitute a quorum." 16 C.F.R. §1000.9.

The CPSC members who voted in favor of the complaint did more than merely expose their views to each other. The actual outcome of the vote was known to Ann Brown before it was taken. There is no other explanation for the scheduling of a press conference, briefing script, interviews, and former plaintiffs and their counsel being present in Bethesda before a vote was taken. In this regard, the Senate Committee report states:

"It is not the intent of the bill to prevent any two agency members, regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views. . . . When two members constitute a quorum, however, the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions. Members of such agencies must use their judgment in these situations, again with the awareness that this bill carries a presumption of openness. Their

discussions should remain informal and preliminary to avoid the open meeting requirement.” S. Rep. No. 94-354, p. 19 (1975).

The conversations that took place between Commissioners Brown and Moore effectively predetermined the Commission’s action. According to the Supreme Court in FCC v. ITT World Communications, Inc., in order to constitute a meeting subject to the Government in the Sunshine Act, “discussions must be ‘sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.’” 466 U.S. 463, 471. The DC Circuit has accepted this language as binding upon it in defining a meeting under the Government in the Sunshine Act. Natural Resources Defense Counsel v. Nuclear Regulatory Commission, 216 F.3d 1180, 1189. The preparation of press releases and talking points, the release of the Complaint to Jayne O’Donnell of USA Today, the invitation of an injured boy’s mother and lawyers, the setting aside of a room for a press conference for the exhibition of videos of the injured boy and for a meeting with Julie Valesse of CNN and other journalists in the week or more before the official Commission vote was taken on October 30, 2001 is persuasive proof that the agency action had been “predetermined” by Commissioners Brown and Moore.

One of the remedies available to a party that has been wronged by a violation of the Act is the setting aside or invalidation of the agency action that resulted. While the Government in Sunshine Act limits the remedial power of a district court that has jurisdiction over a complaint of such a violation solely on the basis of §552b(h)(1) (which grants jurisdiction to district courts to hear the complaint of any person against an agency for the violation of the Act), courts that have jurisdiction to review an agency’s action on some other statutory basis have been reserved broader remedial power in the face of violations of the Act.

“Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.” 5 U.S.C. §552b(h)(2)

The explicit denial of the power “to set aside, enjoin, or invalidate” agency actions to courts with jurisdiction solely under paragraph (1) means that this very same power is reserved to courts with other jurisdiction over agency action. Thus, the Court reviewing the CPSC’s action against Daisy has the power to “afford such relief as it deems appropriate,” including the power “to set aside, enjoin, or invalidate any agency action.” This remedial power rests upon the fact that the court has independent statutory jurisdiction to review the CPSC’s action.

One case in which a court partially invalidated agency action for violation of the open meeting rule of the Sunshine Act was National Assoc. of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367 (D.C. Cir. 1982) at 384-385. In that case, the unexplained rescission of a portion of royalty fees was considered to be in violation of the Copyright Royalty Tribunal’s regulations, modeled after the Sunshine Act. The Court found that it was obligated by 5 USC §706 and 5 USC §552b(h)(2) to invalidate that portion of the award to PBS that had been taken from NPR. It ordered the Copyright Royalty Tribunal “to allocate this amount in accordance with its procedural regulations and the requirements of the Sunshine Act, or to explain that it has already done so.” 675 F.2d at 385.



Another case in which a court partially invalidated agency action for violation of the open meeting rule of the Sunshine Act, among other reasons, was ITT World Communications v. FTC, 699 F.2d 1219, 1246 (D.C. Cir. 1983). However, the Supreme Court later reversed that court's decision, holding that the decision in question was not a "meeting" subject to the Sunshine Act. FCC v. ITT World Communications, 466 U.S. 463, 469-473 (1984).

Respondent's position should be distinguished from Pan American World Airways, Inc. v. Civil Aeronautics Board, 684 F.2d 31 (D.C. Cir. 1982). Despite a violation of the open agency meeting rule of 5 U.S.C. 552b(b), the court in the Pan Am case did not invalidate the Civil Aeronautics Board's (CAB) temporary award of a South American route to Continental Airlines and a London route to American Airlines. The awards were for 11 months and were intended to temporarily replace the service of Braniff Airlines, which had suddenly gone bankrupt, until permanent awards could be made. 684 F.2d at 34. The court in Pan Am held that 5 U.S.C. 552b(h)(2) "strongly indicates a congressional policy that release of transcripts, not invalidation of the agency's substantive action, shall be the normal remedy for Sunshine Act violations." 684 F.2d at 36. The petitioning airlines needed the transcripts of the closed meeting in that case in order to challenge the basis for the agency decision, since "a court may review agency action 'solely' on the basis of 'the grounds invoked by the agency,'" and post-hoc rationalization before a court is subject to "institutional bias in favor of justifying the decision in any way possible." 684 F.2d at 37 n.12. The court found that since the CAB had subsequently released the transcripts from the improperly closed meeting, permitting the airlines to challenge its action in court, it had alleviated any prejudice to the petitioning airlines that resulted from the fact that the meeting had been improperly closed. 684 F.2d at 36-37. The court found it significant that "in the unique circumstances of this case, the violation may have been 'unintentional,' . . . . The fact that no party

asked the Board to open its meeting does not make closure any less a violation of the Act, but it does bear on the willfulness of the violation.” 684 F.2d at 37. The court was “chary, moreover, of visiting the sins of the CAB on the heads of American and Continental. So long as the Board’s awards of temporary route authority to these two carriers were reasonable, we do not feel they should be vacated because they were reached in closed session.” 684 F.2d at 37. See also Braniff Master Executive Council of the Air Line Pilots Association International v. Civil Aeronautics Board, 693 F.2d 220, 226 (D.C.Cir. 1982) (citing Pan Am). The Court found that the violation was remedied by the subsequent release of transcripts, that the violation was unintentional, that invalidation would cause harm to blameless third parties, that the decision reached was reasonable, and did not invalidate the CAB’s awards. Respondent’s case here is clearly distinguishable on every one of the four grounds listed: there has been no transcript of the Moore-Brown meeting released, in fact, probably none exists; the violation was intentional; there would be no harm to third parties caused by the invalidation of the complaint; and the decision to issue a complaint was unreasonable.

The legislative history provides insight into the authority of a court to set aside agency action taken in violation of the Sunshine In The Government Act. The original Senate bill of the Government in Sunshine Act provided jurisdiction to courts over violations of the act in its subparagraph (g) (now subparagraph (h)). Subparagraph (g) provided that except as provided in subparagraph (h) (now subparagraph (h)(2)), courts would not have the power to set aside or invalidate agency actions taken in violation of the Act. Subparagraph (h) explicitly provided that courts with independent authority to review agency action could afford any relief deemed appropriate. H.R. Conf. Rep. No. 94-1441, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1976, 1976 WL 13967 (Leg.Hist.) at 21.

In the first House version of the bill, jurisdiction was provided by subparagraphs (h) and (I). House Report 94-880(I), in its section analysis of subparagraph (h), states that “the court, when acting solely under this subsection, is not authorized to set aside, enjoin, or invalidate any substantive agency action taken or discussed at the meeting in relation to which a violation of this section occurred. . . . the possibility of finding out what transpired at the meeting represents the only realistic remedy available to a plaintiff.” But this language does not apply in Daisy’s situation, because in that version of the bill, subparagraph (I) dealt with the authority of courts that had independent jurisdiction to review agency action, granting them broad remedial authority, including nullification. H.R. Rep. No. 880(I), 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1976, 1976 WL 13965 (Leg.Hist.) at 17.

House Report 94-880(II) on the Government in the Sunshine Act clearly indicates the Congressional intent that courts reviewing agency action on the merits (that is, with jurisdiction on some basis other than the Sunshine Act itself) would have power to invalidate agency actions that were taken in violation of the Sunshine Act. In explaining the deletion of the draft section (I), which explicitly granted this power to courts with independent jurisdiction (and was later replaced as section (h)(2)), the House Report explains that this authority would be duplicative of the authority found in 5 U.S.C. §706, which details the basis for invalidation of agency action. The report states, “Included [in 5 U.S.C. §706] is item (2)(D) which provides that a reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be ‘without observance of procedure required by law’. Adequate authority is therefore provided by law to inquire into matters governed by the new section in the event of such subsequent judicial review.” H.R. Rep. No. 880(II), 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1976) (Striking Subsection (I) referring to Review of Agency Actions), 1976 WL 13966 (Leg. Hist.) at 6. In the “Outline of Provisions of

the Bill,” the House Report goes on to summarize subparagraph (h) by saying, “nothing in the section may be taken as the sole basis for invalidating the agency action involved in the meeting which is the subject of the litigation.” 1976 WL 13966 (Leg. Hist.) at 10.

The Conference Report 94-1441 gives the final and most complete explanation of the power that Congress intended reviewing courts to have. It gives examples of independent authority for review, explaining that “subsection (h)(2) of section 552b . . . provides that any Federal court otherwise authorized to review action (under provisions such as chapter 7 of title 5, U.S. Code, or chapter 158 of title 28, U.S. Code) may, on the application of any person properly participating in the review proceeding, inquire into violations of section 552b by the agency and afford such relief as it deems appropriate.” H.R. Conf. Rep. 94-1441, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1976), at 22. Most helpfully, the Conference Report states that

“The conferees do not intend the authority granted to the Federal courts by the first sentence of subsection (h)(2) to be employed to set aside agency action taken other than under Section 552b solely because of a violation of Section 552b in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation of Section 552b unless that violation is of a serious nature.”

H.R. Conf. Rep. No. 94-1441, 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 1976, 1976 WL 13967 (Leg.Hist.) at 22.

This language clearly shows the understanding of Congress that, in some cases, agency action will be invalidated for violations of the Sunshine Act. This is true in this case, where (1) the violation appears to have been intentional, (2) it was prejudicial to Daisy and (3) it was serious and unreasonable.

### **III. DISQUALIFICATION OF CHAIRMAN BROWN**

Chairman Brown should have disqualified herself from the decision to issue a complaint against Daisy, and when she failed to do so, the CPSC should have responded by examining Daisy's allegations of bias, instead of ignoring them. The Administrative Procedure Act regulating adjudicative proceedings before administrative agencies provides that "the functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner." 5 U.S.C. §556. Additionally, the Code of Federal Regulations pertaining to the Consumer Product Safety Commission provides that when bias of the presiding officer in hearings before the CPSC is alleged, "if the Presiding Officer does not disqualify him/herself, the Commission shall determine the validity of the grounds alleged." 16 C.F.R. §1025.42. Chairman Brown should have disqualified herself from the vote to issue the complaint because of her inability to conduct herself in an impartial manner.

The standard for disqualification of Commissioners for bias is most developed with respect to the Commissioners of the Federal Trade Commission (FTC). On that standard, the actions of Chairman Brown clearly disqualified her from participation in the vote to issue a complaint against Daisy because of her prejudgment of the matter. Where "a disinterested reader of [the Chairman's] speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act," the Chairman's participation amounted to a denial of due process requiring remand to the Commission for reconsideration. Texaco, Inc. v. Federal Trade Commission, 336 F.2d 754 (D.C. Cir. 1964), vacated on other grounds 381 U.S. 739. See also Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583. See also Association of National Advertisers, Inc., et al. v. Federal Trade Commission, et al., 627 F.2d 1151, 201 U.S.App.D.C. 165, cert. denied, 100 S.Ct. 3011 (1980).

#### **IV. THE REVIEW OF PREJUDGMENT AND THE DENIAL OF DUE PROCESS IN THE ISSUANCE OF THE COMPLAINT SHOULD BE IMMEDIATE**

Commissioner Gall's Statement clearly and unequivocally declares the Chairman's  
prejudgment:

"The best explanation for these procedural irregularities can be found in Chairman Ann Brown's August 8, 2001 statement announcing her departure. In this statement she announced both the result of this investigation ("a lawsuit regarding a very dangerous product [which everyone at the Commission knew to be Daisy BB guns] that kills and maims children") and its timetable ("before I leave"). Yet the Commission did not receive its briefing package in the Daisy matter until October 4, 2001. As the Queen of Hearts said in Lewis Carroll's *Alice in Wonderland*: 'Sentence first, verdict afterwards.'" (Statement of the Honorable Mary Sheila Gall In Opposition to Issuance of Administrative Complaint Against Daisy Manufacturing Company, October 30, 2001, p. 2, ¶2).

The Association of National Advertisers case is important in two respects: first, because it clarified the rule for disqualifying an administrative agency chairman in rulemaking, as distinct from adjudication, setting a more restrictive standard than that set forth in Texaco and Cinderella, holding

"... a Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding. The 'clear and convincing' test is necessary to rebut the presumption of administrative regularity. See, e.g., Withrow v. Larkin, 421 U.S. 35, 55, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); Hercules, Inc. v. EPA, 194 U.S.App.D.C. 172, 204, 598 F.2d 91, 123 (D.C.Cir. 1978). The 'unalterably closed mind' test is necessary to permit rulemakers to carry out their proper policy-based functions while disqualifying those unable to consider meaningfully a section 18 hearing." (627 F.2d 1151, p. 1170, 201 U.S.App. D.C. 165, p. 184)

The evidence of Chairman Brown's bias and prejudgement here more than meets the standard set forth in Association of National Advertisers, namely, "clear and convincing evidence of an 'unalterably closed mind' on matters critical to the disposition of the proceeding."

For instance, evidence of the closed mind included the following: on August 8, 2001, Ann Brown called for the recall (or a lawsuit regarding) of a very dangerous product [the Daisy Powerline airguns] that kills and maims children, before she leaves the Commission. And, most importantly, she scheduled a press conference to announce the recall before she was to vote. Obviously, she had already decided the case.

Second is the importance with which the Court of Appeals considered issues relating to prejudgment by the Chairman of an administrative agency. As a general rule, the exhaustion of remedies doctrine provides that challenges to an agency action should not be heard until relevant administrative proceedings have been concluded. The Court of Appeals made an exception to the general rule holding that immediate review of a prejudgment claim involving the chairman of an administrative agency will not thwart the purposes of the exhaustion of remedies doctrine.

"Although the doctrine that permits review of a disqualification claim prior to final agency action is restrictive, the present case falls within its bounds. As the Supreme Court has emphasized, application of the exhaustion doctrine "requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. at 193, 89 S.Ct. at 1662. . . . we find that immediate review of the prejudgment claim will not thwart the purposes of exhaustion."  
(627 F.2d 1151, p. 1156, 201 U.S.App. D.C. 165, p. 170)

Respondent here seeks the same immediate review by the Presiding Officer of the prejudgment and the denial of due process which resulted in the issuance of the Complaint.

**V. INVALIDITY OF THE CPSC COMPLAINT-THE  
NEED FOR RECONSIDERATION AND REMAND**

Chairman Brown's bias and prejudged participation in the vote that led to the CPSC complaint against Respondent renders that complaint invalid, and requires that the CPSC reconsider the propriety of issuing the complaint. Without Chairman Brown's vote, a complaint would not issue because the vote would be 1-1. The Supreme Court held that where a Commissioner of the FTC was biased and has prejudged the decision, amounting to a denial of due process, the case must be remanded to the FTC for decision without the participation of the biased commissioner. Federal Trade Com. v. Texaco, Inc., 381 U.S. 739 (1965). DC Circuit precedents have also held adjudications made by biased administrators to be invalid. In WKAT, Inc. v. Federal Communications Commission, 258 F.2d 418 (1958), the District of Columbia Circuit was presented with a case in which one of the Commissioners of the FCC should have disqualified himself from proceedings for the award of a permit to operate a television station because of improper influence by some of the applicants. The FCC admitted that the Commissioner should have disqualified himself, and the court remanded the appeal of the award to the FCC "to hold an evidentiary hearing concerning the possibility that the award heretofore made may be void ab initio or voidable and that a party, or various parties, may be disqualified by reason of misconduct to receive an award of a television construction permit." 258 F.2d at 419. The District of Columbia has required remand of a case to the Federal Trade Commission because of the bias of a Chairman even when his vote was not necessary for a majority, because "litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." Cinderella Career and Finishing Schools, Inc. v. Federal Trade Commission, 425 F.2d 583 (D.C.



Cir. 1970), quoting Berkshire Employees Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 239 (3d Cir. 1941).

The intervening resignation of Chairman Brown does not cure the tainted decision of its invalidity, for if Respondent is not permitted the remedy of reconsideration of that decision, it will have no remedy at all for the injury that it has suffered and continues to suffer as a result of this litigation. It may be argued that the appropriate remedy for a party injured by a decision reached with the participation of Chairman Brown is a challenge to the decision itself rendered after a hearing before the Presiding Officer reviewed by the Commission (from which Chairman Brown has resigned) and ultimately by the courts. It is submitted that Respondent should not be required to wait that long nor go that far. To require such steps would be a terrible waste of judicial economy. The Presiding Officer should remedy this denial of due process at the outset by dismissing the Complaint and permitting the question of whether a complaint should issue to be remanded to a Commission uncontaminated with the abuse of process which has characterized the Commission's decision in this case.

### CONCLUSION

The Complaint should be dismissed.

Dated: March 26, 2002

Respectfully submitted,

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Daisy-Memorandum of Law.wpd

## CERTIFICATE OF SERVICE

I am over the age of 18 years and not a party to the within action. I hereby certify that on March 26, 2002, I have served the attached document described as **MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS THE COMPLAINT** on all parties and participants of record in these proceedings as follows:

Jimmie L. Williams Jr.  
Complaint Counsel  
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William Moore, Esq.  
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Honorable William Moran  
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by placing a true copy thereof enclosed in a sealed envelope. I am "readily familiar" with the firm's practice of collection and processing for mailing. Under the practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepared in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

  
Jean Vincent